

Report of the Special Committee on Family Law

The Special Committee on Family Law consisted of the following members in 2014:-

Jacqueline Leong, SC (Chair)

David Pilbrow, SC

Corinne Remedios

Lisa Remedios

Jeremy Chan

Robin Egerton

The Committee has met several times during 2014 to consider a range of issues relating to Family Law including advising the Bar Council on various proposals by the administration and the judiciary concerning legislation, supporting subsidiary measures and the introduction of judicial practice directions. Some members of the Committee also sit, in their personal capacities, on several committees and working parties dealing with family law matters and the cross-fertilisation between them provides useful links for the Bar on many of the important initiatives being pursued in this discipline.

Important issues that the Committee has considered during 2014 include:-

Marriage (Amendment) Bill 2014

This Bill was presented in May 2014 to amend the Marriage Ordinance to implement an order of the CFA in May 2013 in the case of *W v. The Registrar of Marriages (FACV 4/2012)* and provide for related matters. In that judgment the CFA declared that the Matrimonial Causes Ordinance and the Marriage Ordinance must be read and given effect to so as to include within the words “woman” and “female” a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. The CFA suspended this declaration for 12 months to afford the government and the Legislative Council a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected. The CFA agreed to suspend the declaration in the light of the government’s submission that any corrective enactments to render the impugned enactments constitutional would require consideration of issues significantly broader than those arising specifically in relation to the appellant, having a possible impact on the institution of marriage and beyond. Since then, the government has done very little apart from this Bill which does not address in any

way the broader classes of persons indicated by the CFA. Indeed the Bill only gives effect to the relief to which W and others in exactly that position are entitled to in any event whether or not consequential legislation is put in place. Thus the Bill has not assuaged the predicaments faced by transsexuals and has failed to deal with what the CFA considered to be the “distinctly preferable” way of addressing the wider issue. It is a disappointing failure to deal properly, fully and meaningfully with the clearly stated intentions of the CFA and the needs of society.

Family Procedure Rules

The Judiciary has issued an Interim Report and Consultation Paper proposing the streamlining of procedures in all areas of family law under a unified set of Rules. The Committee largely agrees with those recommendations but has made some specific alternative proposals which include:-

- (a) Pre-action protocol: the Committee points to problems that have arisen in other common law jurisdictions and urges further research before implementation as a party in urgent need of relief should not be barred from the Court by pre-action protocol.
- (b) Service of documents: the Committee is concerned about the proposal to allow service by registered post, facsimile, document exchange or email.
- (c) The removal of MCR Rule 6: the Committee considers that a means should continue to exist to enable parties to seek the approval or otherwise of the Court of proposed agreements unless and until there is a comprehensive statutory code governing marital agreements.
- (d) Citing 3rd parties (co-respondents/2nd respondents): the Committee considers that it is important that a party against whom allegations of adultery or improper association are made should continue to be given an opportunity to deny it, although the Committee has suggested possible means by which inconvenience or costs implications caused by this may be reduced.
- (e) Discovery orders against a third party who is not directly involved in the proceedings: the Committee is concerned that the introduction, which would be contrary to the prevailing situation in other areas of the law, could create inappropriate limitations upon the current right of such a third party to seek to set aside any application for a subpoena against him.
- (f) The Committee urges that steps be taken to amend the existing Rules in relation to judgment summonses in the MCR which are inconsistent with Articles 10 and 11 of the HK Bill of Rights.

Private Financial Adjudication

The Judiciary intends to introduce a pilot scheme for Private Financial Adjudication (“PFA”) in contested applications for ancillary relief. This is similar in some respects to systems operating in various other jurisdictions of private judging conducted pursuant to contractual agreements between parties to submit to the same. The Judiciary has prepared a draft Practice Direction to govern such adjudication and the Committee has been invited to submit its views on that draft. The Committee welcomes the initiative to introduce PFA and suggests various aspects for consideration including:-

- (1) PFA, which is akin to arbitration or litigation, should add to but not take away from current modes of Alternative Dispute Resolution (“ADR”).
- (2) PFA should only take place after exchange of Form E and after sufficient discovery and disclosure to facilitate PFA since it should be predicated upon a continuing duty of full and frank financial disclosure.
- (3) Generally speaking, parties should participate in Financial Dispute Resolution (“FDR”) before considering PFA as FDR is simpler, faster and more cost effective and thus PFA should only arise after FDR has been attempted and failed. Before engaging in PFA, the parties should consider participating in Family Mediation, and, generally speaking, unless there are good reasons not to do so, should have already participated and engaged in an attempted FDR.
- (4) There should not be a stay of all proceedings between the parties pending the PFA as a stay should not be absolute nor all-encompassing and there should remain liberty to make appropriate applications in the proceedings to the Court as and when needed.
- (5) Consideration is needed as to whether the PFA process can or should be extended to disputes involving third parties e.g. disputes about beneficial ownership or similar. However this would require a tripartite PFA agreement and consequential amendment/revision of the draft Practice Direction.

The Committee would welcome the views of members of the Bar on any of the foregoing and on any other matters of interest or concern in the practise of family law in Hong Kong.

Jacqueline Leong, SC
Chair
Special Committee on Family Law

31 December 2014